

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Leo Raymond

v.

Civil No. 10-cv-488-LM

Bob Mariano Jeep Dodge Sales

**O R D E R**

In a case that has been removed from the Merrimack County Superior Court, Leo Raymond is suing his former employer in four counts, seeking damages for age and disability discrimination under both federal law (Counts I-III) and state law (Count IV). Before the court is defendant's motion to dismiss a portion of Count IV for failure to state a claim. Raymond objects. For the reasons given, defendant's motion to dismiss is granted.

**The Legal Standard**

A motion to dismiss for "failure to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6), requires the court to conduct a limited inquiry, focusing not on "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible

on its face.” Sutcliffe v. Epping Sch. Dist., 584 F.3d 314, 325 (1st Cir. 2009) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). On the other hand, a Rule 12(b)(6) motion should be granted if “the facts, evaluated in [a] plaintiff-friendly manner, [do not] contain enough meat to support a reasonable expectation that an actionable claim may exist.” Andrew Robinson Int’l, Inc. v. Hartford Fire Ins. Co., 547 F.3d 48, 51 (1st Cir. 2008) (citations omitted).

### **Background**

The relevant facts, drawn largely from Raymond’s complaint, are as follows.

Leo Raymond was born in 1946. He has a hearing impairment that requires him to wear hearing aids.

In 1998, Raymond started working as a salesperson for Bob Mariano Jeep Dodge Sales. He was supervised by General Manager Brian Duval and Sales Manager Tim Randolett. His job performance has always been good.

Upon Duval’s promotion to the position of Sales Manager in 2005, Duval and Randolett began to harass Raymond, based on his age and hearing impairment, in a variety of ways. Regarding his age, they called him “old man” and told him that he did not do a good job selling cars because he was too old. When Raymond received a high rating on a “secrete shopper” survey, Duval said, in public, that he was surprised that Raymond could

remember things well enough to get a good rating. Regarding Raymond's hearing impairment, Duval and Randolett pretended to speak to him by moving their lips without making any sound. They also yelled in his ear and increased the volume of the dealership's public address system, knowing that when Raymond was wearing his hearing aids, loud noises caused him pain.

In addition, based on Raymond's age and hearing impairment, Duval and Randolett excluded him from good sales prospects, gave him the least desirable work station in the showroom, disproportionately assigned him non-remunerative tasks such as clearing snow off cars, and excluded him from a sales meeting to which other salespersons were invited.

Finally, in February 2008, when Raymond told Duval of his intention to take his annual vacation during the week of July 6, Duval told him that another salesperson had already asked to have that week off and that he (Duval) did not want two salespeople to be away from work at the same time on at least one occasion. However, Duval did allow two salespeople to be away from work at the same time. In May, when the vacation schedule was posted, Raymond did not get the week he requested. He then told Duval that he had already put down a deposit on his family's vacation housing. Duval did not tell Raymond that he could not take his vacation during the week he had selected. On July 5, one day before he started his vacation, Raymond reminded

Duval that he was going on vacation the next day. Duval told Raymond that if he did not come to work the next day, he would be quitting his job. When Raymond returned from vacation, Duval told him that his employment had been terminated.

Based on the foregoing, Raymond filed a timely charge of discrimination with the New Hampshire Commission for Human Rights ("Human Rights Commission" or "HRC") and the Equal Employment Opportunity Commission. The HRC found probable cause for Raymond's hostile-work-environment claim, see Pl.'s Obj., Attach. B (doc. no. 10-3), at 2, but determined that Raymond's claim for discriminatory termination was not supported by probable cause, see id. Raymond did not appeal that determination under the procedure described in N.H. Rev. Stat. Ann. ("RSA") § 354-A:21, II(a).

After the HRC issued its findings, defendant removed Raymond's hostile-work-environment claim to the Merrimack County Superior Court, pursuant to RSA § 354-A:21-a, and subsequently removed the case to this court. In this court, Raymond filed an amended complaint, doc. no. 6, in which he asserts that he was subjected to a hostile work environment, due to his age and hearing impairment, in violation of 42 U.S.C. § 12112 and 29 U.S.C. § 623 (Count I); that his sales efforts were undercut on account of his age and disability (Count II); and that he was terminated because of his age, disability, and perceived

disability (Count III). He further asserts, in Count IV, that each of the federal claims stated in Counts I-III also states a claim under RSA § 354-A:7.

### **Discussion**

Defendant moves to dismiss Count IV to the extent that Count IV asserts a claim for discriminatory termination under RSA 354-A:7. Defendant argues that while the Human Rights Commission determined that Raymond's hostile-work-environment claim was supported by probable cause, it also determined that his claim for discriminatory termination was not. In defendant's view, because Raymond had no right to a superior court trial on the merits of his state-law discriminatory-termination claim, pursuant to RSA 354-A:21-a, I, he has no right to a trial on the merits of that claim in this court either.

In response, Raymond begins by characterizing the HRC's partially favorable and partially unfavorable probable-cause determination as a "mixed finding." He then argues that RSA 354-A:21, II(a), which establishes the right to Superior Court review of unfavorable probable-cause determinations, does not contemplate mixed findings and, by its express language, only grants a right of appeal when a complaint, as opposed to a charge or a claim, has been dismissed for lack of probable cause, which did not happen in this case, owing to the HRC's

determination that the hostile-work-environment claim was supported by probable cause. In Raymond's view, the fact that his complaint was not dismissed by the HRC barred him from seeking judicial review of the adverse probable-cause determination and counsels in favor of allowing him to pursue his claim for discriminatory termination in this court.

Raymond also argues that if the court were to accept defendant's position, it would place complainants in mixed-finding cases in the untenable position of either dropping the claim(s) for which the HRC found no probable cause or bifurcating their complaints by challenging the unfavorable probable-cause determination(s) in one proceeding while pursuing the merits of the claims for which probable cause was found in a different proceeding. According to Raymond, such a result would be burdensome on the parties and an inefficient use of judicial resources. He concludes by noting the legislature's instruction that "[t]he provisions of [RSA 354-A] shall be construed liberally for the accomplishment of the purposes thereof." RSA 354-A:25. While Raymond's argument has a certain appeal, in the end, it is insufficient to stave off dismissal of the state-law discriminatory-termination claim asserted in Count IV.

Raymond filed his Charge of Discrimination with the HRC on September 5, 2008. Notice of Removal, Ex. 1 (doc. no. 1-2), at 1. Starting 180 days thereafter, Raymond had the right to bring

a civil action in the superior court based on the allegations in his Charge of Discrimination, and that option remained open to him until three years after the occurrence of the allegedly unlawful practice. See RSA 354-A:21-a, I. Raymond did not bring a civil action in the superior court. On August 5, 2010, the HRC issued an investigative report that included a finding of probable cause for Raymond's hostile-work-environment claim and a finding of no probable cause for his discriminatory-termination claim. The relevant statute provides that "[w]hen the investigating commissioner finds no probable cause to credit the allegations in the complaint, the complaint shall be dismissed, subject to a right of appeal to superior court." RSA 354-A:21, II(a).<sup>1</sup> While the HRC did not dismiss Raymond's complaint, due to the investigating commissioner's determination that the hostile-work-environment claim was supported by

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<sup>1</sup> A superior court appeal of a determination of no probable cause is subject to the following procedures and standards:

To prevail on appeal, the moving party shall establish that the commission decision is unlawful or unreasonable by a clear preponderance of the evidence. The findings of the investigating commissioner upon questions of fact shall be upheld as long as the record contains credible evidence to support them. If it reverses the finding of the investigating commissioner, the superior court shall remand the case for further proceedings in accordance with RSA 354-A:21, II, unless the complainant or respondent elects to proceed with a hearing in superior court pursuant to RSA 354-A:21-a.

RSA 354-A:21.

probable cause, it effectively dismissed the discriminatory-termination claim, in that it is clear that no further proceedings on that claim, such as those described in RSA 354-A:21, II(b)-(f), would have been available to Raymond before the HRC after it issued its investigative report. As noted, Raymond did not appeal the unfavorable probable-cause determination to the superior court.

Based on the investigating commissioner's determination that Raymond's hostile-work-environment claim was supported by probable cause, the HRC scheduled a public hearing, pursuant to RSA 354-A:21, II(b), on the following issue:

Whether Complainant was unlawfully discriminated against by his employer who created a hostile work environment based on age and disability in violation of NH RSA 354-A:7(I), Title I of the Americans with Disabilities Act of 1990 ["ADA"], 42 U.S.C. §12101 et seq. and §623(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA") as amended.

Notice of Removal, Ex. 2 (doc. no. 1-2), at 1. On September 27, 2010, defendant removed that claim to the Merrimack County Superior Court, as was its right under RSA 354-A:21-a, I, which provides that "[a]ny party alleged to have committed any practice made unlawful under this chapter may, in any case in which a determination of probable cause has been made by the investigating commissioner, remove said complaint to superior court for trial." That statute further provides that "[a] superior court trial shall not be available . . . to a



complainant whose charge has been dismissed as lacking in probable cause who has not prevailed on an appeal to superior court pursuant to RSA 354-A:21, II(a).” Id. Because Raymond never appealed the adverse probable-cause determination on the discriminatory-termination claim that the HRC effectively dismissed, is it clear that the superior court would not have reached the merits of that claim had Raymond attempted to pursue it in that forum.

But, of course, the case was removed to this court. More specifically, the case defendant removed consisted solely of Raymond’s hostile-work-environment claim. For all intents and purposes, the discriminatory-termination claim was abandoned by virtue of Raymond’s failure to appeal the HRC’s adverse probable-cause determination to the superior court. That claim came back into this case after it was removed to this court, when plaintiff filed his amended complaint. For its part, defendant indicated in its answer to the amended complaint that it was simultaneously filing the motion currently before the court to challenge Raymond’s legal right to pursue his state-law claim for discriminatory termination.

While Raymond argues that considerations of litigant convenience and judicial economy counsel in favor of allowing him to litigate the merits of his state-law discriminatory-termination claim in this court, the bifurcation he identifies

as problematic has been a part of this case ever since the HRC issued its two probable-cause findings; from that point on, Raymond's two claims have been on separate tracks. Moreover, bifurcation is mandated by RSA 354-A:21-a itself, which plainly requires that charges, i.e., claims, be treated differently depending on whether or not the HRC has found probable cause for them.

The statute does not expressly address the issue of "mixed findings," but there is nothing in the statute or the case law to suggest that the legislature ever contemplated that a complainant could by-pass the appeal requirement for adverse probable-cause determinations by piggybacking a claim not supported by probable cause onto a claim for which the HRC found there was probable cause in the superior court, or by eschewing the appeal process and later injecting a claim not supported by probable cause into the case after remand to federal court by means of an amended complaint. In short, because Raymond had no right to a hearing on the merits of his state-law discriminatory-termination claim before the HRC, and had no right to a trial on the merits in the superior court, he has no right to a hearing on the merits in this court, either. Thus, defendant is entitled to the partial dismissal it seeks.

In so ruling, the court makes the following observations. The court's interpretation of RSA 354-A:21 and 21-a, which

results in a decision in defendant's favor does impose the logistical costs of bifurcation on claimants in Raymond's position. But, such an interpretation does not deny claimants in Raymond's position the opportunity to fully pursue claims for which the HRC initially finds no probable cause. On the other hand, however, an interpretation that would result in a decision in Raymond's favor would give claimants in his position something the legislature plainly intended to deny them, the right to a trial on the merits of a claim for which the HRC has not found probable cause. Notwithstanding the legislature's "liberal construction" mandate, RSA 354-A:21 and 21-a are best understood as requiring a favorable probable-cause determination, from the HRC or the superior court, before a complainant can pursue a claim in court, on the merits.

Finally, the court has considered, but must reject, one possible solution to Raymond's bifurcation problem. Specifically, the court entertained the possibility of reviewing the HRC's adverse probable-cause determination under the same standards that the superior court would apply if Raymond had pursued the statutory appeal process. But, notwithstanding the surface appeal of that approach, it would not be appropriate. The age- and disability-discrimination claims defendant removed from the HRC to the superior court, and from the superior court to this court, are properly before this court because this court

would have original jurisdiction over them in the first instance. See 28 U.S.C. § 1441(a).

An appeal of the HRC's probable-cause determination, however, is another matter. If Raymond had appealed the HRC's probable-cause determination, it is not at all clear - and it seems highly unlikely - that defendant could have removed that appeal to this court. This court has original jurisdiction over both ADA claims and ADEA claims. But, it is far less certain that an HRC probable-cause determination presents a federal question. The ADA and the ADEA are federal statutes that provide causes of action. An HRC complainant's obligation to establish probable cause as a prerequisite to getting a hearing on the merits before the HRC (or in the superior court) is purely a creature of state law. On that basis, a complainant's appeal of an adverse probable-cause determination would not appear to be removable from the superior court to this court. Accordingly, the court declines to review the HRC's determination that Raymond's discriminatory-termination claim was not supported by probable cause.

### **Conclusion**

For the reasons given, defendant's motion to dismiss, doc. no. 9, is granted. Count IV is now limited to a claim under RSA

354-A that mirrors the federal claims asserted in Counts I and II.

**SO ORDERED.**



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Landya B. McCafferty  
United States Magistrate Judge

Date: February 17, 2011

cc: Debra Weiss Ford, Esq.  
H. Jonathan Meyer, Esq.